JD(ATL)–55–03
Cookville, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

VAN DE VOORDE ELECTRIC, LLC

and **CASE 26–CA–20495**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 429

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SUPPLEMENTAL DECISION AND CERTIFICATION OF BENCH DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: On June 24, 2003, in Nashville, Tennessee, I opened a bearing to determine Respondent's backpay obligation in this case. After the parties rested, I heard oral argument, and on June 27, 2003, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Remedy is set forth below.

[1] The bench decision appears in uncorrected form at pages 225 through 242 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification. Corrections include the amount of backpay, $18,282.68 rather than $18,282.60, and the numbering of certain paragraphs in the Bench Decision.

REMEDY

Van De Voorde Electric, LLC shall make whole Tony Adams by paying him $18,282.68 with interest to be computed in the manner prescribed in ***New Horizons for the Retarded,*** **283 NLRB** 1173 (1987), minus tax withholdings required by Federal and State laws.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

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This is a supplemental decision in Van De Voorde Electric, LLC, 26–CA–20495. It is a bench decision issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent must pay to Discriminatee Tony Adams $18,282.68, with interest and less applicable state and federal taxes to make him whole for the Respondent's unlawful discrimination against him.

Background

At all material times, Tony Adams has been an organizer with International Brotherhood of Electrical Workers, Local No. 429, which I will call "the Union" or "Local 429." Like many other local unions affiliated with the International Brotherhood of Electrical Workers, Local 429 sometimes will make an exception to its rule prohibiting Union members from working for nonunion companies. The Union grants such permission so that its members will have the opportunity to meet and organize the nonunion workers.

When a union member or official applies to work for an employer to help the union organize the workers, that person is called a "salt." The International Union conducts classes to train prospective "salts." They learn, for example, that when it comes time to terminate their employment with the targeted employer, they should not simply quit but instead should go "on strike" because of a striker's presumed reinstatement rights.

Before becoming a paid Union organizer, Adams worked for many years as an electrician in Illinois. There, he was a member of a local union affiliated with the International Brotherhood of Electrical Workers and sometimes acted as a "salt" without receiving pay from the union for this service.

After joining Local 429's paid staff, Adams applied for jobs with nonunionized electrical contractors as part of his Union organizing duties. When Respondent failed to hire him, the Union filed an unfair labor practice charge alleging that Respondent had discriminated against Adams because of his association with the Union.

After a hearing, the Board found that Respondent had violated Section 8(a)(3) and (1) of the Act and ordered Respondent to hire Adams and pay him backpay. Respondent did hire Adams, but it has not reached agreement with the Board's General Counsel concerning the amount of backpay due Adams.

Therefore, on March 7, 2003, the Regional Director for Region 26 of the Board issued a Compliance Specification and Notice of Hearing which alleged that Respondent could discharge its backpay obligation by paying Adams $18,607.67 plus interest accrued to the date of payment, minus the tax withholding required by federal and state laws. The Regional Director later amended the Compliance Specification to reduce the alleged total net backpay to $18,282.68.

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On June 24, 2003, a hearing opened before me in Nashville, Tennessee. After the General Counsel and Respondent had rested, counsel for both sides presented oral argument on June 26, 2003. Today, June 27, 2003, I issue this bench decision.

Stipulated Facts

Before the compliance hearing opened in Nashville, Tennessee on June 23, 2003, the parties entered into a written "Stipulation of Facts and Issues." This stipulation, in evidence as General Counsel's Exhibit 3, stated as follows:

> 1. On November 27, 2002, the National Labor Relations Board (the Board), issued an Order directing the Respondent to, inter alia, make Tony Adams whole for any loss of earnings he may have suffered as a result of Respondent's unlawful failure to hire Adams on June 21, 2001, less any net interim earnings, plus interest.
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> 2. Thereafter, Respondent entered into a Stipulation approved by the Regional Director for Region 26 on February 6, 2003. In this Stipulation, Respondent waived all rights to contest the propriety of the Board Order.
>
> 3. A controversy having arisen concerning the amount of compensation due under the terms of the Board Order, the Regional Director issued a Compliance Specification and Notice of Hearing on March 7, 2003, alleging that Respondent's make whole liability to Adams totaled $18,607.67, plus interest accrued to the date of payment, minus the tax withholding required by Federal and State laws. An Amended Answer to Compliance Specification was served by Respondent on April 22, 2003. The specificaiton was subsequently amended by an Amendment to Compliance Specification that issued on May 30, 2003.
>
> 4. The Parties hereby stipulate that the backpay period as alleged in the specification began on June 21, 2001, the date Respondent refused to hire Adams, and continued through October 8, 2002, the date an offer of employment was extended to Adams by Respondent.
>
> 5. The Parties hereby stipulate and do not contest that the gross backpay calculations for Adams, as set forth in Appendix A to the specification, totaling $21,440.00, represents a reasonable calculation of what Adams' earnings would have been if Adams had worked consistently for Respondent throughout the entire backpay period alleged in the specification.
>
> 6. The Parties hereby stipulate and do not contest that during the backpay period alleged in the specification, Adams had interim earnings totaling $3,317.40 and that Adams claims interim expenses totaling $974.97, as set forth in Appendix A–1 to the specification.
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> 7. The Respondent does contest the amounts claimed by Adams as interim expenses for each calendar quarter, as set forth in Appendix A–1 to the specification, and revised Appendix B (attached hereto). Respondent acknowledges and does not contest that interim expenses should be offset against interim earnings.

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8. The Parties acknowledge that the issue of whether Adams engaged in reasonable efforts to mitigate backpay during the backpay period remains in dispute and it will be necessary to present oral and documentary evidence on this issue at the hearing scheduled to commence on June 23, 2003.

9. The Parties acknowledge that the issue of whether Adams engaged in reasonable efforts to mitigate backpay during the backpay petriod remains in dispute and it will be necessary to present oral and documentary evidence on this issue at the hearing scheduled to commence on June 23, 2003.

10. The Parties acknowledge that the issue of the applicability and precedential value to be given to *Aneco, Inc.*, 333 NLRB 691 (2001), enf. denied in part 285 F.3d 326 (4th Cir. 2002) is a matter that remains in dispute.

11. The Parties stipulate that the only matters in issue at the evidentiary hearing scheduled for June 23, 2003 are: (1) the amounts claimed by Adams as interim expenses; (2) whether Adams fulfilled his obligation to mitigate backpay; and (3) in what manner the Board and Circuit Court decisions in *Aneco* should apply to the facts of the instant case.

12. The Parties acknowledge that the Amended Answer served by Respondent on April 22, 2003, adequately reflects Respondent's position as to the three remaining issues in dispute, and there is no need for Respondent to file any further Answer or responsive pleading in this case.

General Counsel's Exhibit 3 (attached appendix omitted). Based on this stipulation, I find the facts recited above to be true.

During the hearing, the General Counsel and Respondent orally stipulated that Adams appropriately incurred interim expenses of $35.88 during the third quarter of 2001 and $124.20 for the third quarter of 2002. I so find.

The Interim Expenses Issue

In calculating net backpay, the Board subtracts from gross backpay the wages which a discriminatee earned in interim employment. This reduction assures that Respondent is only required to make the discriminatee whole for losses occasioned by the unlawful discrimination. However, if the discriminatee incurs expenses in seeking and holding the interim employment, then such expenses are subtracted from the interim earnings.

Based on the stipulation of the parties and the entire record, I find that Adams incurred total interim expenses of $160.08, as alleged in the Compliance Specification, as amended.

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The Mitigation Issue

As the parties stipulated, the backpay period began June 21, 2001, the date Respondent refused to hire Adams, and continued through Octouber 8, 2002, the date Respondent offered Adams employment. During this period, Adams had an obligation to mitigate Respondent's ongoing backpay liability by searching for other work. Respondent asserts that Adams did not make a reasonable search for work, and therefore did not satisfy his duty to mitigate.

For clarity, it may be helpful to mention a principle which no one in this proceeding disputes. At all times during the backpay period, including when he was working for an interim employer, Adams continued to hold his fulltime job as Union organizer and received his regular pay for this work. Compensation for his work as an organizer does not fall within the category of "interim earnings," and the amount of such compensation is not subtracted from gross backpay. See ***Feguson Electric Co.***, 330 NLRB 514 (2000).

Adams had applied for work as an electrician as a second job, and during the backpay period, Adams had a duty to seek similar secondary employment to mitigate Respondent's backpay liability. Adams had a responsibility to exercise reasonable diligence in searching for such work. Respondent bears the burden of proving that Adams did not exercise such reasonable diligence.

In determining whether a discriminatee has been reasonably diligent in searching for work, the Board applies the same standard to discriminatees who are union organizers as it does to other discriminatees. But although the standard is the same, circumstances usually are quite a bit different when the discriminatee is a union organizer.

The union organizer seeks secondary employment to further the objectives of his primary employer. A job with a nonunionized employer gives the organizer the opportunity to work alongside unrepresented employees and persuade them of the union's merits. Typically, such a union organizer limits his job search to those companies which have no relationships with the union. That means the organizer does not apply for work through his union's hiring hall, which refers job seekers to companies that have signed collective–bargaining agreements with the union.

The Board does not equate use of the hiring hall with "reasonable job search." Similarly, it does not assume that a discriminatee will conduct an inadequate job search merely because he is a paid organizer only seeking work at companies he might unionize. Instead, it judges each case on its particular facts, and places on a respondent the duty of showing that the union organizer restricted his job search to an unreasonable degree.

Adams credibly testified that he regularly read the help–wanted advertisements in the Nashville *Tennessean* and the Cookeville, Tennessee, ***Herald–Citizen***. From time to time he also looked for job opportunities advertised in other area newspapers. To find out when new construction projects would begin, he regularly referred to the ***Dodge Report***, a periodical which could be accessed online.

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On cross–examination, Adams admitted that in looking for work, he usually did not use the Yellow Pages to find electrical contractors. However, Board law does not require a job seeker to let his fingers do the walking. Rather, the discriminatee satisfies his mitigation duty by making a good faith effort to follow his usual method of seeking employment.

During the backpay period, Adams did find and accept work with two employers. This achievement reflects favorably on Adams' diligence. However, in each instance, he left the job after a relatively short period of time even though he could have continued to work there. Such conduct does open to question Adams' seriousness about holding down a second job.

At one point, he obtained employment with a company called Tempco, which operated a labor pool, sending out its employees to other companies to provide temporary services. Adams testified that he worked for Tempco only two days. He explained that he stopped working there because Tempco was going to send him to a company he did not trust, Gateway Electric. According to Adams, he had heard that Gateway Electric did not pay sufficient attention to safety and that it was going bankrupt.

Adams' explanation is not particularly persuasive. It concerns me that he left Tempco without working at Gateway even one day to find out whether the rumors he had heard about safety conditions were true. Such action seems precipitous and does reflect, to some extent, on Adams' good faith in seeking interim employment.

It is also difficult to accept at face value Adams' testimony that he quit Tempco because of concerns about Gateway Electric's rumored financial difficulties. He worked for Tempco and presumably received his paycheck from Tempco, which would have a duty to pay him for hours worked even if it did not receive payment from its customer, Gateway. However, I do not conclude that Adams' abrupt, voluntary departure from Tempco was so unreasonable that it demonstrated bad faith.

Adams worked longer for another interim employer, PowerTek. The record suggests that PowerTek had rejected an earlier application submitted by Adams, but ultimately hired him pursuant to the settlement of an unfair labor practice charge.

Adams testified that he began at PowerTek on August 13, 2001 and worked there until September 6, 2001, when he went on an "economic strike." Adams was the only employee who went on strike.

After conferring with the Union's business manager, Adams returned to work at PowerTek on September 12, 2001 and continued to work there until October 4, 2001, when he went "on strike" again. He has not worked at PowerTek since that time. Adams did not have any other interim employment during the backpay period although, as already noted, he did continue to work fulltime for the Union.

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In evaluating the adequacy of a discriminatee's search for work, I consider that person's job–seeking efforts over the entire backpay period. The record here establishes that Adams spent a significant amount of time checking help–wanted ads and contacting potential employers. Additionally, Adams looked for employment through the State of Tennessee's job service. He also went to the Upper Cumberland Career Center in Cookeville, Tennessee.

Considering Adams' total efforts during the backpay period, I conclude that he exercised reasonable diligence in his search for employment and satisfied the duty to mitigate backapy. Therefore, I must reject Respondent's argument to the contrary.

The *Aneco* Issue

Respondent offered Adams employment on October 8, 2002 as an electrician's helper. In accordance with the parties' stipulation, I find that the backpay period ended on this date.

On November 27, 2002, Adams began what he called an "economic strike" against Respondent and has not worked there since that time. Based on Adams' testimony, he went "on strike" to obtain a pay increase for himself. No other employee joined him in that "strike." However, the present backpay proceeding does not require me to determine whether or not this "strike" constituted activity protected by the National Labor Relations Act.

Although Adams characterized his action as a "strike," it may be noted that the Union advises its "salts" to terminate their employment by striking rather than quitting. It also is significant that Adams never presented his request for a pay raise to anyone higher than "leadman" in the Respondent's chain of command. The General Counsel does not allege, and the record does not establish, either that this leadman was a supervisor or that the leadman acted as Respondent's agent in talking with Adams about his pay.

Respondent argues that if it had offered Adams a job when he first applied, rather than refusing him employment unlawfully, Adams would not have worked there any longer than he actually worked for Respondent in 2002: Because Adams sought employment with Respondent only to further the Union's organizing objectives – and not because he needed the work – he had no interest in continuing to work for Respondent when it no longer served the Union's interests.

To support this argument, Respondent cites ***Aneco, Inc. v. N.L.R.B.,*** 285 F.3d 326 (4th Cir. 2002). In that case, a panel of the United States Court of Appeals for the Fourth Circuit partially denied enforcement of the Board's Decision and Order in ***Aneco, Inc***., 333 NLRB No. 88 (March 29, 2001). The parties in the present case stipulated that one issue to be decided here concerns "in what manner the Board and Circuit Court decisions in *Aneco* should apply to the facts of the instant case."

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In *Aneco*, the respondent rejected the application of a paid union organizer, Cox, who was also a qualified electrician. Five years later, after the Board found that this respondent had discriminated unlawfully, Aneco offered Cox a job. He accepted, worked for five weeks and then went "on strike." The judge concluded that Cox actually had quit.

In essence, the General Counsel argued that Cox was entitled to backpay for the entire five years between the time he applied for work and the time Aneco finally offered him a job. However, the administrative law judge concluded that Cox would not have worked for this employer that long. The record established that Cox had sought this employment to further the Union's "salting" program, and it was clear that he would have terminated that employment whenever it no longer served the union's interests.

The judge concluded that if Aneco had offered Cox employment when he first applied in 1993, Cox would have worked there for about five weeks and then quit, because that is what Cox did when he finally went to work for Aneco in 1998. The judge wrote, "I find that there is no better indication of how long Cox would have continued his employment with Respondent in 1993 than how long Cox actually did continue his employment with the Respondent in 1998." 333 NLRB No. 88, slip op. at 6. The Board reversed, stating, in part:

> [T]he judge himself found no evidence that organizing the Respondent's employees in 1993 was easier or more difficult than in 1998. However, he erroneously relied on the absence of such evidence to conclude that Cox would have worked the same length of time in either year. We find that, in so doing, the judge contravened the well–established principle that the Board resolves compliance–related uncertainties or ambiguities against the wrongdoer.

333 NLRB No. 88, slip op.at 2 (internal quotation marks omitted), citing ***Ferguson Electric Co.***, 330 NLRB 514 (2000).

Aneco appealed this decision to the Fourth Circuit. A three judge panel reversed the Board. One of the three judges dissented.

The panel majority held that the evidence of Cox's role as a union salt, the fact that he only worked 5 weeks for Aneco in 1998, and the lack of any evidence of a union salt ever working for an employer for 5 years, rebutted the presumption of continued employment. It remanded the case to the Board with a strong hint that Cox should be entitled to about five weeks backpay.

What effect does the Fourth Circuit's decision have on the present case, which arose in the Sixth Circuit? It could, of course, be considered as persuasive authority, even though not controlling. However, this area of the law is still developing and it is not clear how much persuasive effect the decision would have, particularly considering that it was not by the court en banc.

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More fundamentally, an administrative law judge serves as the Board's agent and is bound to follow the precedents of the Board except when overturned by the Supreme Court. Therefore, I am guided by the Board's decision in *Aneco*.

Moreover, there are significant differences between the facts in *Aneco* and the facts in the present case. Although I am not a mind reader, I believe that in *Aneco*, the administrative law judge was particularly troubled by the 50–fold difference between the amount of time Cox actually worked and the amount of time for which backpay was sought. Considering Cox's actual behavior, it strained the imagination to believe that he really would have worked for Aneco for five years.

The record in *Aneco* demonstrated that the union's "salting" program had two objectives: Organizing unrepresented workers and running up the operating costs of nonunion contractors by making it necessary for the companies to retain counsel and defend their actions in legal proceedings. Considering these twin objectives, it appeared quite likely that Cox would have quit working for *Aneco* just as soon as those objectives had been accomplished.

The present record does not depict the Union as being so at war with Respondent. A number of factors do cause me to doubt that Adams would have continued to work for Respondent for the entire backpay period alleged in the Compliance Specification, but these doubts do not surmount the Board's strong policy that any uncertainties should be resolved against the wrongdoer.

Moreover, the present case does not involve a 50–fold difference between the alleged backpap period and the amount of time that Adams actually worked for Respondent before terminating his employment.

It certainly may be argued that there is a distinction between a doubt as to the exact time Adams would have worked and a doubt that he would have kept working for Respondent throughout the backpay period. It is difficult to explain the difference except by a hypothetical illustration.

Suppose that a man had never seen or even heard of a kangaroo. When he finally encountered that animal, he would have considerable uncertainty about what it was, but he would know positively that it was not a cow. Likewise, a mathematician does not have to know the millionth digit of pi to know with certainty that this constant is not equal to 3.

In that sense, it is possible to reach a doubt–free conclusion that Adams would not have worked for Respondent for the entire backpay period, even though uncertainty existed as to exactly how long he would have worked. However, although this argument has a certain logical appeal, I believe it is inconsistent with the Board's reasoning in *Aneco* and therefore reject it.

Following the Board's holding in *Aneco*, and resolving any uncertainties in favor of the discriminatee, I find that Respondent must pay Adams backpay for the full period alleged in the Compliance Specification, in the amount alleged in the Compliance Specification as amended.

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When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. When that Certification is served upon the parties, the time period for filing an appeal will begin to run. Throughout this proceeding, counsel have demonstrated a high degree of civility and professionalism, which I truly appreciate.

The hearing is closed.